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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-162

HENRY D. DODSON and G. EVERETT MILLICAN,
Petitioners,

vs.

WILLIAM GRAHAM, JR., Etc., et al., and METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

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To the United States Court of Appeals for the Fifth Circuit

Your petitioners respectfully show as follows:

JUDGMENT OF LOWER COURT

The judgment of the United States Court of Appeals for the Fifth Circuit in this case, which is unreported, is appended hereto.

JURISDICTION TO GRANT THE WRIT

This is a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the case entitled **Henry D. Dodson and G. Everett Millican, Plaintiffs-Appellants v. William Graham, Jr., Etc., et al., Defendants-Appellees, Metropolitan Atlanta Rapid Transit Authority, Intervenor-Appellee,** Case No. 71-3545, said judgment being dated and entered on May 31, 1972. On June 13, 1972, petitioners herein filed a petition for rehearing in the lower court, and an order denying said petition for rehearing was entered on June 29, 1972, a copy of said order and the notice from the clerk of the court being appended hereto. On June 30, 1972 the petitioners herein filed in the lower court a motion to stay the mandate of the lower court, a copy of which is appended hereto. Said motion to stay the mandate was granted by the lower court on July 10, 1972.

The jurisdiction of this court is invoked under 28 USC, § 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1

Does an individual citizen and voter have standing to pursue a declaratory judgment concerning a state election law which that individual claims is in violation of the Voting Rights Act of 1965 (42 USC, § 1973c) when there has been no court determination regarding such new state election law?

2

Section 5 of the Voting Rights Act of 1965, codified as 42 USC, § 1973c, reads as follows:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure:

Provided, that such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, **except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.** Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court." (Emphasis added.)

Under the above Federal Code Section, where the county attorney of one county of Georgia, which has 159 counties,

makes a request of the U.S. Attorney General for a ruling regarding a state election law enacted by the Legislature of the State of Georgia, can such action by the local county attorney be construed to mean that the State of Georgia has asked for a ruling about a state election law?

3

Under 42 USC § 1973c, even if the request for a ruling by the county attorney of one county of Georgia is properly held to be binding upon the State of Georgia and even if the U.S. Attorney General does not interpose an objection to the new state election law in question, does not an individual citizen and voter have standing to seek a declaratory judgment and an injunction against the enforcement of the new state election law in question?

4

Did the original complaint of the petitioners allege sufficient facts of intimidation, as prohibited by the 1965 Civil Rights Act (42 USC § 1973 (i) (b)), to entitle the petitioners to a jury trial (or trial without jury) to determine the validity of the allegations of the petitioners?

5

Do the provisions of the new state election laws, which were challenged by the complaint, deny equal protection of the laws and due process as guaranteed by the Fourteenth Amendment to the United States Constitution?

6

In a separate suit filed by different party plaintiffs in the Superior Court of DeKalb County, Georgia, the plaintiffs in that suit claimed that the same new state election

laws denied them equal protection of the law and due process guaranteed by the Fourteenth Amendment to the United States Constitution. The state trial court ruled against the plaintiffs therein; the case was appealed to the Court of Appeals of the State of Georgia and the Court of Appeals of the State of Georgia ruled against those plaintiffs; those plaintiffs then filed an application for a writ of certiorari to the Supreme Court of Georgia (which is the highest appellate court of Georgia); the U.S. Court of Appeals for the Fifth Circuit in its judgment, dated May 31, 1972, held that the Georgia Court of Appeals had resolved all non-federal issues. Was the ruling of the Court of Appeals of Georgia, which is not the highest appellate court of Georgia, binding on the U.S. Court of Appeals for the Fifth Circuit? After the ruling of the Fifth Circuit, the Georgia Supreme Court denied the writ of certiorari.

7

Was the ruling of the Georgia Court of Appeals or the Georgia Supreme Court a final determination of whether or not the new state election laws denied equal protection and due process of the law to those other plaintiffs in the state case, or was that ruling a final determination as to equal protection and due process as to the petitioners herein; and even if the state courts did rule upon the question of equal protection in the state case, was the Fifth Circuit bound in any way by such a ruling concerning the Fourteenth Amendment to the United States Constitution?

8

Were the petitioners entitled to a three judge panel as provided in the last sentence of 42 USC §1973c?

CONSTITUTIONAL PROVISIONS AND STATUTES

The following are the constitutional provisions and statutes involved in this case:

(1) Fourteenth Amendment to the United States Constitution

(2) 42 USC § 1973c (Voting Rights Act of 1965) which is set forth hereinabove verbatim

(3) 42 USC § 1973ib:

> "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under sections 1973a (a), 1973d, 1973f, 1973g, 1973h, or 1973j (e) of this title."

(4) Georgia Code Sections 34-1701, 34-1702, 34-1703, 34-1704, 34-1705, 34-1706, 34-1707, 34-1708, all of which set forth grounds and method of contest of elections in Georgia. (See appendix.)

(5) Georgia Code Sections 34-806 and 34-1218, which provide that paper ballots (which were used in this election) are illegal. (See appendix.)

(6) 1967 Georgia Acts, page 3211 which transferred the duties in the supervision of elections from an elected constitutional officer (the Ordinary of the county) to an appointative person (the Supervisor of Elections, Graham) and Georgia Code Section 34-401, which contained the laws changed by the 1967 law. (See appendix.)

STATEMENT OF THE CASE

Plaintiffs Dodson and Millican are residents of Fulton County, Georgia. Defendant Graham is a resident of DeKalb County, Georgia. On November 9, 1971 a question was submitted the voters of Fulton, DeKalb, Gwinnett and Clayton Counties, in an election, for approval or disapproval of a contract between said counties, City of Atlanta and MARTA whereby, if both Fulton and DeKalb Counties voted in favor of the contract, all counties voting for the contract would approve a sales tax in those counties to finance the construction of a rapid transit system (to be built and operated by MARTA) in those counties approving the contract. Dodson and Millican brought this action on their own behalf and on behalf of the 53,000 residents and voters in Fulton County who voted against said contract, both Dodson and Millican being of that class.

The first tabulation of votes by Graham showed that the Yes vote exceeded the No vote by 2,011 votes. Then Graham recounted the votes and his second count showed that the No votes exceeded the Yes votes by 282. Then Graham made another tabulation and this time the Yes vote exceeded the No vote by 461.

Graham made two attempts to certify the results of the election to the Georgia Secretary of State. Graham is the public official who publicly declared the results of the election.

Graham never actually recounted the votes in making his tabulations but merely recounted the tally sheets from each precinct and plaintiffs in their original action asked for a recount of all ballots in Fulton County and that the ballots be impounded until such a recount could be conducted by the Court. Plaintiffs further allege that a recount of all ballots would show that the No votes exceeded

the Yes votes and that this recount would change the result of the election.

The original petition alleged that there were enough missing ballots that would change the results of the election and that all ballots had never been accounted for as required by Georgia law. The first paragraph of Judge Smith's Order stated as follows:

> "Following the hearing here, a recount was ordered in Fulton Superior Court."

and note 1 on page 1 stated that "The judicial recount showed a margin of 471." in favor of MARTA. Of course, what happened in the Fulton Superior Court recount has no bearing on whether or not there is federal jurisdiction of the instant suit. Reference to such recount in the court order compels the following brief explanation for the information of this court. The recount conducted by Fulton Superior Court in the case brought by Henry Henderson included only the ballots which were used or which were spoiled and did not include any accounting or count of the ballots which were not used, as required by Georgia law. That case is on appeal to the Court of Appeals of the State of Georgia because of the failure to count the unused ballots as well upon other grounds.

The original petition alleged that people favoring a Yes vote for MARTA were allowed to go inside the polls, distribute MARTA literature to voters, place MARTA literature on tables where poll workers were performing their duties and post MARTA literature on the walls inside the various voting places as well as the entrance to the polls. In one precinct where there has been an extended controversy over highway I-485, the literature stated that a Yes vote for MARTA was a No vote against I-485. Plaintiffs allege that these actions by the MARTA supporters and this literature published by MARTA constituted not only

violations of Georgia election laws but also a conspiracy to intimidate as well as actual intimidation in violation of the Civil Rights Act.

Plaintiffs further allege that although the Election Code of the State of Georgia as adopted by the General Assembly in 1970, and as amended, hereinafter referred to as the "election code", may be valid and constitutional, the application of said election code to this election is unconstitutional in that it deprives the Plaintiffs of the equal protection of the law and of due process as guaranteed by the Fourteenth Amendment to the Constitution of the United States, because of the facts set forth hereinafter. The Georgia election code (34-1701 (b) (iii)) provides that the defendant in a contest of an election must be the public official who formally declared the number of votes for or against any question submitted to electors at an election. In this election this official is Defendant Graham. The election code requires that a suit in state court to contest an election must be tried and determined by the Superior Court of the county where the defendant shall reside (34-1704 (a)). Although Defendant Graham is the Supervisor of Elections for Fulton County, he resides in DeKalb County and the election code would require a state suit to be filed in DeKalb County. The election code (34-1704 (b)) provides that the trial in DeKalb County would have to be tried by the Judge of the Superior Court who resides nearest the DeKalb County courthouse but who resides in a judicial circuit wholly outside the area involved in the contest. The immediate area involved in the contest is Fulton County but a change in the result of the Fulton County election would change the result of the DeKalb County election so that the judge would have to be selected outside of the Atlanta Judicial Circuit and the Stone Mountain Judicial Circuit. The election code (34-1707) would require the jury to be impanelled in Fulton County for a trial of a case in DeKalb County, a con-

fused situation for which there is no precedent. Jurors of one county can not be forced to serve in another county. Judges of one county can not impanel juries in another county. Party litigants are entitled under the law for their issue to be decided by their peers, that is, the jurors in the county where the suit is brought whereas the election law would require Fulton County jurors to sit in a DeKalb County courthouse and try this case. Such a confused situation was not the intent of the Legislature and under the facts in this case the application of the election law is unconstitutional under due process clause of the Fourteenth Amendment and the Plaintiffs have no course of redress in the courts of the State of Georgia. Furthermore, Section 34-1704 gave the Governor of Georgia the power to appoint a judge to serve in the place of "such senior judge" who is designated to preside over election contests of government officials but it does not give the Governor power to appoint a judge to preside over a contest case involving a question, in lieu of a judge who resides in a judicial circuit outside the area involved in the contest.

Plaintiffs further allege that the General Assembly of the State of Georgia, in extra session in 1964, adopted an act which is codified in the Georgia Code 34-401 (a) through (l). Said code section sets forth the powers and duties of ordinaries pertaining to elections in the State of Georgia. Subparagraphs (i) and (j) of Code Section 34-401 read as follows:

> "(i) To receive from poll officers the returns of all primaries and elections, to canvass and compute the same, and to certify as soon as practicable following the primary and election the results thereof to such authorities as may be prescribed by law.
>
> (j) To publicly announce by posting in his office the results of all primaries and elections held in his county."

The Ordinary of Fulton County is an elective constitutional officer.

In 1967, the Georgia Legislature adopted an Act (1967 Acts, page 3211) which transferred the duties of the Ordinary of Fulton County as set forth in Code Section 34-401 to the Fulton County Board of Elections. The Fulton County Board of Elections and Defendant Graham, as Supervisor of Elections of Fulton County, are appointive positions.

Said Legislative Act of the special session of the Georgia Legislature in 1967 is in violation of 42 U.S.C. § 1973c.

And finally, the petition alleged that said election was conducted by the use of paper ballots, which was illegal as a violation of Georgia Code § 34-806 and § 34-1218. Vote recorders or voting machines have previously been authorized and used in general and special elections in Fulton County, Georgia. The complaint filed in the United States District Court for the Northern District of Georgia, Atlanta Division, claimed jurisdiction under the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment of the United States Constitution, under the Voting Clause of the Civil Rights Act, under 38 USC § 1331 (federal questions), under 28 USC § 2201 (declaratory judgments), and under 42 USC § 1973c (1965 Voting Rights Act). The only question argued or ruled upon at the first and only hearing in the U. S. District Court was the question of federal jurisdiction. Judge Sidney Smith, the trial judge, made this statement at the beginning of the hearing "I don't find any federal question so I don't see any jurisdiction in the federal court to one in your position. This is the thing I want to hear from the plaintiffs about."

REASONS FOR GRANTING WRIT

(1) The question presented in this petition for certiorari are of great and general importance. The provisions of the Voting Rights Act of 1965 have generally been applied only to the southern states, but these states contain 63 million people. The principles of the Voting Rights Act of 1965 should apply to all citizens. The interpretation of this Act is of utmost importance because one of the great privileges of citizenship is involved, that is, the right to vote.

(2) The questions presented in this petition involve tremendous economic consequences to the people who live in the Metropolitan Atlanta area. The rapid transit contract which was the subject of the election, will result in the expenditure of one and one-half billion dollars in the construction of the proposed transit system and another one and one-half billion dollars for its operation. The three billion dollars must come primarily from taxes levied on the one and one-half million people who live in the metropolitan Atlanta area. The people in four counties in this area were permitted to vote in the election and a majority of all the people, who voted, voted against the rapid transit contract. However, the Georgia Legislation provided that the vote in Gwinnett and Clayton counties was not controlling and that only the vote of Fulton and DeKalb counties was necessary to approve the rapid transit contract. The published vote of Fulton and DeKalb counties stated that the election carried by a mere 461 votes out of 107,000 cast. The individual petitioners and the class they represent, being all the people who voted against the contract, are entitled to be heard by this Court because of the staggering economic consequence which will be undoubtedly suffered if the lower court's rul-

ing stands and if this election, in fact and in law, was illegal.

(3) The opinion and judgment of the trial court and the Fifth Circuit are in direct conflict with the opinion of this Court in the case of **Richard Allen, et al. v. State Board of Elections, et al.**, 393 US 544, 22 L.Ed. 2d 1. The **Allen** case included four cases from Mississippi and one case from Virginia and was decided in 1969. The **Allen** case specifically construed 42 USC § 1973c in a manner which is contrary to the opinion of the Fifth Circuit. This Court held that the act of the Mississippi Legislature which substituted an appointed Superintendent of Education for the County Superintendent of Education who had previously been elected was an act that was unenforceable because it violated the Voting Rights Act of 1965. In the instant case, the 1967 Act of the Georgia Legislature substituted an appointed officer to replace the County Ordinary who had previously been an elected officer. We contend that this 1967 Georgia Act was unenforceable, that it was in violation of the Voting Rights Act of 1965 and that the election was illegally held.

(4) The decision of the Fifth Circuit involves the important question of whether an individual citizen and voter has standing to challenge a state election law when there has been no court decision concerning that law. We contend that if only the United States Attorney General or an individual State can challenge the validity of election laws, then the rights of individuals have been dangerously eroded and the power of the federal and state governments are unreasonably fortified.

(5) In recent years this court has zealously protected the guarantees of equal protection and due process which are contained in the Fourteenth Amendment to the United States Constitution. We have contended that the state

election laws challenged in this lawsuit violate these guarantees and we urge the Court to examine carefully the effect of the questioned election laws.

Wherefore, your petitioners pray that this Application for a Writ of Certiorari be granted and for such further relief as this Court may deem proper.

MORETON ROLLESTON, JR.
2604 First National Bank Building
Atlanta, Georgia 30303
Attorney for Petitioners

APPENDIX A

In the
United States Court of Appeals
for the Fifth Circuit

No. 71-3545

Henry D. Dodson and G. Everett Millican,
Plaintiffs-Appellants,

versus

William Graham, Jr., Etc., Et Al.,
Defendants-Appellees,

Metropolitan Atlanta Rapid
Transit Authority,
Intervenor-Appellee.

Appeal From the United States District Court for the Northern District of Georgia

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(May 31, 1972)

Before Thornberry, Coleman and Ingraham, Circuit Judges.

Coleman, Circuit Judge: This litigation is concerned with the validity and the outcome of a special election held in Fulton County, Georgia, on November 9, 1971,

to determine the will of the voters as to the approval or disapproval of a "Rapid Transit Contract and Assistance Agreement", Georgia Laws 1965, page 2243, as amended. For lack of jurisdiction, the instant action, brought in the United States District Court by Dodson and Millican, was dismissed. We affirm.

As finally certified, there were 53,760 votes in favor of the agreement and 53,299 votes against it. This was a razor thin majority of 461 out of a total of 107,059 votes cast. There had been two previous tabulations, one showing a favorable majority of 2,011 while the other reflected an opposition majority of 282.

Within a few days of the final certification, suits were filed in the Georgia Superior Courts, one in Fulton County and the other in the adjoining county of DeKalb. The Fulton Superior Court ordered a full recount of the votes. This recount resulted in a majority of 471 in favor of the proposed Rapid Transit Contract and Assistance Agreement, with judgment accordingly. The suit in DeKalb was dismissed for lack of jurisdiction, it there being held that the Fulton County Board of Registration and Elections was the proper defendant in a contest of the November 9 special election.

These cases were appealed to the Court of Appeals of Georgia, where all were either affirmed or the appeals dismissed. [Nos. 47,012, 47,013, 47,014, and 47,035, *Henderson, et al. v. County Board of Registration & Elections, et al.; County Board of Registration & Elections v. Henderson, et al.; Metropolitan Rapid Authority v. Henderson, et al.;* and *Ollilla v. Graham, Supervisor of Elections, etc.,* April 21, 1972, . . . S.E.2d . . . (Ga., 1972)].

The Georgia Court of Appeals held: (1) It was not error for the trial judge to conduct the recount of the ballots without the intervention of a jury; (2) the trial

judge properly disregarded alleged irregularities in two precincts where the rejection of the vote in those precincts would not change the results of the election; (3) there was no showing of a sufficient quantity of spoiled ballots, not accounted for, to place the result in doubt; (4) the Fulton County Board of Registration and Elections was the proper defendant in the election contest, and jurisdiction resided in the Superior Court of Fulton County.

The resolution of these non-federal issues by the state courts leaves for our determination in the case now before us only one fundamental question: Was the special election of November 9, 1971 conducted in violation of § 5 of the Voting Rights Act, 42 U.S.C., 1973c (1970)?[1]

---

[1] The Voting Rights Act of 1965, passed by the Congress of the United States became effective August 6, 1965. The State of Georgia is one of the states in the Union covered by the provisions of the Act. In its entirety, § 5 of the Voting Rights Act of 1965 (Title 42, United States Code, § 1973c) provides:

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualifications, or procedure: *Provided*, That such qualification, prerequi-

See, e.g., *Allen v. Board of Elections*, 1969, 393 U.S. 554, 89 S.Ct. 817, 22 L.Ed.2d 1.

Appellants primarily contend that the District Court had jurisdiction of their election contest suit under § 5 and that federal three-judge district court jurisdiction over their suit should be entertained because the Georgia law of 1967 transferring the duties of the Ordinary of Fulton County under the Georgia Election Code to the Fulton County Board of Elections was not submitted to the Attorney General of the United States by the *Attorney General of Georgia* but by the County Attorney for Fulton County.

Appellees contend that they complied with § 5 in that the state law, transferring the duties of the Ordinary, was submitted to the United States Attorney General by the Fulton County Attorney, with no ensuing objections from the Attorney General.

Furthermore, appellees contend that § 5 of the Voting Rights Act of 1965 is inapplicable since it was stipulated at trial that the 1967 Georgia law did not have the effect of denying any person the right to vote because of race or color. We find it unnecessary to decide this latter point.

We thus come to the dispositive question:

Has the 1967 Georgia law transferring the duties of the Ordinary of Fulton County under the Georgia Election

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site, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section will bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

Code to the Fulton County Board of Elections been "subjected to the required federal scrutiny" as provided by § 5 of the Voting Rights Act of 1965?

Traditionally, the conduct of elections in Georgia on a local level has been entrusted to the Ordinary of each county. The authority to administer elections was continued in the Ordinary by the Georgia Election Code, approved June 24, 1964 [Ga. L. Extra Session 1964, p. 26, codified as Title 34 of the Georgia Code]. This was the Georgia law in effect prior to November 1, 1964.

On April 18, 1967, the Georgia General Assembly approved an Act [Ga. L. 1967, p. 3211] which provided that in

> "each county of this State having a population of more than 500,000 according to the 1960 United States decennial census and any future such census"

the duties and powers encumbent upon the Ordinary by virtue of the Georgia Election Code would be vested in a County Board of Elections.

It is undisputed that Fulton is the only Georgia County with a population of more than 500,000.[1a]

Following the enactment of the 1967 Georgia law and an amendment thereto [Ga. L. 1968, p. 2867], Harold Sheats, the County Attorney of Fulton County, wrote the Attorney General of the United States on April 18, May 16, and August 19 (1968), requesting approval of the law.

[1a] This result is by no means accidental. The Georgia Legislature has granted Georgia cities only a very limited power of home rule. See GA. CODE ANN. §§ 69-1015 to -1017 (1967); GA. CODE ANN. § 1018 (Supp. 1971). The Legislature remedies this lack of municipal power to some extent by promulgating "population bills", such as that involved in the instant case, which are used to govern individual cities. *See generally* Dougherty County v. Bush, 179 S.E.2d 343 (Ga. 1971); McAllister v. State, 140 S.E.2d 838 (Ga. 1965).

First Letter

April 18, 1968

The Attorney General
Department of Justice
Washington, D.C.

Dear Sir:

The Attorney General of Georgia has suggested that we write you concerning certain bills adopted by the Legislature of Georgia, and which relate to voting procedure.

While we do not consider that any of these bills relate to civil rights or to "voting qualifications or prerequisites to voting, or standard, practice, or procedure with respect to voting", the Attorney General feels that you should be advised of same, and your approval or disclaimer of interest obtained.

Therefore, your consideration and immediate advice on the subject will be appreciated.

Yours very truly,

Harold Sheats
County Attorney

HS/v

Copy: Hon. Arthur Bolton
The Attorney General
State of Georgia

Attachments:

Copy of House Bill No. 1224

Copy of Georgia Laws 1967, pp. 3211-3215

Second Letter

May 16, 1968

The Attorney General of the
United States
Department of Justice
Washington, D. C.

Dear Sir:

We have recently written you on several occasions, submitting copies of legislation and procedures in connection with the Board of Elections of Fulton County. We have been advised to do so by the Attorney General of Georgia because of the recent voting rights legislation.

We have heard nothing from your office and are not aware whether or not this legislation and these procedures have the approval of your office. In our opinion the legislation and the procedures are designed only to improve the election process, and have not the slightest taint of discrimination.

Inasmuch as the Department of Justice has been so active in matters of this nature, we feel you should at least respond to our requests for approval or disapproval while your opinion on the subject can be effective.

Yours very truly,

Harold Sheats
County Attorney

HS/v

Third Letter

August 19, 1968

Mr. Stephen J. Pollak
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D. C.

Dear Mr. Pollak:

Some weeks ago we forwarded to you a copy of the 1967 Statute of the General Assembly of Georgia, creating an Election Board in Fulton County. The function of the Board is to facilitate and make more efficient the election process, exclusive of registration which is handled by the Board of Registrars.

We have received approval from your office concerning other matters of this nature, reported to you, but have not specifically obtained any statement from you concerning the creation and functions of the Election Board. We assume that you have no objection since none has been stated. However, for the sake of the record, we request your consideration and a statement from you concerning the existence or non-existence of objection on your part.

Yours very truly,

Harold Sheats
County Attorney

HS/v

After these persistent efforts by the County Attorney, the following response was received:

Washington, D. C.
October 30, 1968

Mr. Harold Sheats
County Attorney
504 Courthouse
Atlanta, Georgia 30303

Dear Mr. Sheats:

This is in reply to your letters of April 18, 1968 and August 19, 1968, concerning the submission of H. B. 511, as amended by H. B. 1224, an act of the 1967 General Assembly of Georgia creating an election board in counties having a population in excess of 500,000. I apologize for the delay in replying to you.

The Attorney General has no objection to the enforcement of either H. B. 511 or H. B. 1224. You are probably aware, however, that Section 5 of the Voting Rights Act of 1965 provides that failure to object does not bar a subsequent action to enjoin the enforcement of either of these acts if they are shown, in operation, to violate the Fifteenth Amendment or other Federal laws securing the right to vote.

Sincerely,

Stephen J. Pollak
Assistant Attorney General
Civil Rights Division

In the light of the foregoing, we hold that the transfer of duties to the Fulton County Election Commission was submitted to the Attorney General of the United States and that he manifested no objection to it.

Appellants say, however, that the submission was invalid because it was made by the *county attorney* rather than by the state attorney general.

We are of the opinion that the answer to this contention is to be found in the Regulations promulgated by the United States Attorney General, 36 Fed. Register 18187 (1971):

> "Section 5 requires that, prior to enforcement of any change affecting voting, the State or political subdivision which has enacted or seeks to administer the change affecting voting must obtain either a judicial or an executive determination that denial or abridgment of the right to vote on account of race or color is not the purpose and will not be the effect of the change.
>
> • • • • • • •
>
> "Changes affecting voting shall be submitted by the chief legal officer or other appropriate official of the State or political subdivision in which the change is proposed to be effective. When one or more counties within a State will be affected, the State may submit a change, affecting voting on behalf of the covered county or counties."

Fulton County was the only Georgia county or political subdivision affected by the 1967 Act.

Fulton County was the only Georgia county or political subdivision charged with the responsibility of administering the change ordered by the 1967 Act of the General Assembly.

The County Attorney of Fulton County diligently and persistently over a period of several months sought the

approval or disapproval of the Attorney General of the United States relative to the 1967 Georgia law. Moreover, he acted at the suggestion of the state attorney general.

The Attorney General of the United States, on October 30, 1968, discharged his responsibility under §5 by notifying the County Attorney that the 1967 Georgia law had been approved.

This amounted to compliance with the federal statute and with the regulations promulgated thereunder. The second contention of appellants cannot be sustained.

We agree with the District Court that the record is bereft of anything that could possibly be construed to constitute intimidation, threats, or coercion (or an attempt at such) within the meaning of §11(b) of the Voting Rights Act of 1965, 42 U.S.C., 1973i(b).[2]

The judgment of the District Court dismissing the complaint is

AFFIRMED.

---

[2] Section 11(b) of the Voting Rights Act of 1964, 42 U.S.C., § 1973i(b). Section 1973i(b) provides:

> "No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 1973(a), 1973(d), 1973f, 1973g, 1973h, or 1973j(e) of this title."

APPENDIX B

United States Court of Appeals
For the Fifth Circuit

October Term, 1971

No. 71-3545

D. C. Docket No. 15868

Henry D. Dodson and G. Everett Millican,
Plaintiffs-Appellants,

versus

William Graham, Jr., Etc., et al.,
Defendants-Appellees,

Metropolitan Atlanta Rapid Transit Authority,
Intervenor-Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before Thornberry, Coleman and Ingraham, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendants-appellees and intervenor-appellee the costs on appeal to be taxed by the Clerk of this Court.

May 31, 1972

Issued as Mandate:

APPENDIX C

In the
United States Court of Appeals
For the Fifth Circuit

No. 71-3545

Henry D. Dodson and G. Everett Millican,
Plaintiffs-Appellants,

versus

William Graham, Jr., Etc., et al.,
Defendants-Appellees,

Metropolitan Atlanta Rapid Transit Authority,
Intervenor-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

---

On Petition for Rehearing

(Filed June 29, 1972)

Before Thornberry, Coleman and Ingraham, Circuit Judges.

Per Curiam:

It Is Ordered that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

APPENDIX D

United States Court of Appeals
Fifth Circuit
Office of the Clerk

June 29, 1972

Edward W. Wadsworth
Clerk

Room 408-400 Royal St.
New Orleans, La. 70130
(504) 527-6514

To All Parties Listed Below

Re: No. 71-3545—Henry D. Dodson & G. Everett Millican vs. Wm. Graham, Jr., etc., et al.; Metropolitan Atlanta Rapid Transit Authority

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours
EDWARD W. WADSWORTH
Clerk
By ALVIS M. WINCHESTER
Deputy Clerk

/amw

cc: Mr. Moreton Rolleston, Jr.
Mr. John Tye Ferguson
Mr. R. Wm. Ide, III

APPENDIX E

In the United States Court of Appeals
for the Fifth Circuit

No. 71-3545

Henry D. Dodson and G. Everett Millican,
Plaintiffs-Appellants,

Versus

William Graham, Jr., etc., et al.,
Defendants-Appellees,

Metropolitan Atlanta Rapid Transit Authority,
Intervenor-Appellee.

Motion to Stay Mandate

Now come Henry D. Dodson and G. Everett Millican, Appellants in the above styled case and, in accordance with Rule 41 (b) of this Court, move for a stay of the mandate in this case pending application to the Supreme Court for a Writ of Certiorari.

MORETON ROLLESTON, JR.
Attorney for Appellants

2604 First National Bank Tower
Atlanta, Georgia 30303
522-1243

Certificate of Service

I, Moreton Rolleston, Jr., Attorney for Appellants herein, do say that I have this day mailed the required number of service copies of this Motion to Stay Mandate to counsel for Appellees, said counsel being:

R. William Ide, III
822 Fulton Federal Building
Atlanta, Ga. 30303

John Tye Ferguson
927 Fulton Federal Building
Atlanta, Ga. 30303

George P. Dillard
558 Church Street
Decatur, Georgia 30030

This 30th day of June, 1972.

MORETON ROLLESTON, JR.

APPENDIX F

United States Court of Appeals
Fifth Circuit

Office of the Clerk

Edward W. Wadsworth
Clerk

Room 408-400 Royal St.
New Orleans, La. 70130

July 11, 1972

Mr. Moreton Rolleston, Jr.
Attorney at Law
2604 First National Bank Tower
Atlanta, Georgia 30303

No. 71-3545—Henry D. Dodson and G. Everett Millican vs. William Graham, Jr., etc., et al., Metropolitan Atlanta Rapid Transit Authority

Mandate Stayed to: August 10, 1972

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in con-

nection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion, judgment and order denying rehearing which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

Edward W. Wadsworth, Clerk

By Claudette Staiger
Deputy Clerk

enc.

cc: Mr. John Tye Ferguson
Mr. R. William Ide, III

APPENDIX G

Chapter 34-17. Contested Primaries and Elections

Sec.

34-1701. Definitions.

34-1702. Contest authorized; contestant.

34-1703. Grounds for contest.

34-1704. Superior court of county of defendant's residence to have jurisdiction; presiding judge.

34-1705. Petition; contents; verification; filing; notice; special process; answer; cross-action; amendment.

34-1706. Hearing; powers of court.

34-1707. Jury trial.

34-1708. Judgment; nomination, election or eligibility declared invalid; second primary or election.

34-1709. Appellate review.

34-1710. Costs, liability for.

34-1701. Definitions.—The following words, when used in this Chapter, shall have the following meanings, unless otherwise clearly apparent from the context:

(a) the word "contestant" shall mean any person or persons entitled under the provisions of section 34-1702 to contest the result of any primary or election; and

(b) The word "defendant" shall mean: (i) the person whose nomination or election is contested; (ii) the person or persons whose eligibility to seek any nomination or office in a runoff primary or election is contested; or (iii)

the public officer who formally declared the number of votes for and against any question submitted to electors at an election; as the case may be (Acts 1964, Extra. Sess., pp. 26, 177.)

• • • • • • • •

34-1702. Contest authorized; contestant.—The nomination of any person who is declared nominated at a primary as a candidate for any Federal, State or county office; or the election of any person who is declared elected to any such office (except when otherwise prescribed by the Federal or State Constitution); or the eligibility of any person declared eligible to seek any such nomination or office in a runoff primary or election; or the approval or disapproval of any question submitted to electors at an election; may be contested by any person who was a candidate at such primary or election for such nomination or office, or by any aggrieved elector who was entitled to vote for such person or for or against such question.

(Acts 1964, Extra. Sess., pp. 26, 177; 1968, pp. 871, 884.)

• • • • • • • •

34-1703. Grounds for contest.—A result of a primary or election may be contested on one or more of the following grounds:

(a) Malconduct, fraud or irregularity by any primary or election official or officials sufficient to change or place in doubt the result;

(b) when the defendant is ineligible for the nomination or office in dispute;

(c) When illegal votes have been received or legal votes rejected at the polls sufficient to change or place in doubt the result;

(d) For any error in counting the votes or declaring the result of the primary or election, if such error would change the result;

(e) For any other cause which shows that another was the person legally nominated, elected or eligible to compete in a runoff primary or election. (Acts 1964, Extra. Sess., pp. 26, 178.)

* * * * * * * *

34-1704. Superior court of county of defendant's residence to have jurisdiction; presiding judge.—(a) A contest case governed by the provisions of this Chapter shall be tried and determined by the superior court of the county where the defendant shall reside. A contest case challenging the eligibility of the two defendants declared as eligible to compete with each other in a runoff primary or election shall be tried and determined by the superior court of the county where the defendant who received the highest number of votes shall reside.

(b) The superior court having jurisdiction of a contest case involving nomination for or election to a Federal, State or county office filled by the vote of electors of the State-at-large or within a single judicial circuit shall be presided over by the senior judge of superior court in time of service in the judicial circuit or circuits adjoining the judicial circuit containing the county in which the contest is instituted. In any other contest case, the superior court having jurisdiction shall be presided over by the judge of superior court who resides nearest the courthouse in which the contest is filed but who resides in a judicial circuit wholly outside of the congressional or senatorial district or other area involved in the contest.

(c) Upon the filing of a contest petition, the clerk of the superior court having jurisdiction shall immediately notify the senior judge described in subsection (b) above of the institution of proceedings under this Chapter; and if such judge is disqualified or unable to serve, the clerk shall immediately notify the Governor of such fact and he shall thereupon appoint a disinterested judge of superior

court, residing outside of the judicial circuit in which the contest is pending, or judge of the superior court emeritus, to serve in the place of such senior judge. Such judge or judge emeritus shall promptly begin presiding over such proceedings in such court and shall determine same as soon as practicable. He shall be reimbursed for his actual expenses for food and lodging and he shall receive the same mileage allowance as other State officials and employees.

(Acts 1964, Extra. Sess., pp. 26, 178; 1969, pp. 329, 348.)

• • • • • • • •

34-1705. Petition; contents; verification; filing; notice; special process; answer; cross-section; amendment.—(a) A petition to contest the result of a primary or election shall be filed in the office of the clerk of the superior court having jurisdiction, within five days after the official consolidation of the returns of that particular office or question and certification thereof by the election official having responsibility for taking such action under the provisions of this Code, and shall allege: (i) the contestant's qualification to institute the contest; (ii) the contestant's desires to contest the result of such primary or election and the name of the nomination, office or question involved in the contest; (iii) the name of the defendant; (iv) the name of each person who was a candidate at such primary or election for such nomination or office in the case of a contest involving same; (v) each ground of contest; (vi) the date of the official declaration of the result in dispute; (vii) the relief sought; and (viii) such other facts as are necessary to provide a full, particular and explicit statement of the cause of contest.

(b) When an error in the counting of votes is alleged as a ground of contest, it is sufficient for the contestant to state generally that he believes that error was committed

in the counting of the votes cast for the filling of the nomination or office in dispute, or for or against the question in dispute in one or more specified election districts, and it shall not be necessary for the contestant to offer evidence to substantiate such allegation. If a recount of the votes cast in any election district or districts shall change the result in dispute, then any aggrieved litigant may require a recount of the votes affecting such result, which were cast in any other district or districts, by amending his pleadings and requesting such relief.

(c) The petition shall be verified by the affidavit of each contestant. Such affidavit shall be taken and subscribed before some person authorized by law to administer oaths, and shall state that the contestant believes the facts alleged therein are true, that according to the best of his knowledge and belief the contested result of the primary or election is illegal and the return thereof incorrect, and that the petition to contest the same is made in good faith.

(d) A statement of the grounds of contest shall not be rejected, nor the proceedings dismissed by any court, for want of form, if the grounds of contest are alleged with such certainty as will advise the defendant of the particular proceeding or cause for which the primary or election is contested.

(e) Upon such petition being filed, the clerk shall issue notice, in the form of special process directed to the sheriff of such county, requiring the defendant and any other person named in such petition as a candidate for such nomination or office, if any, to appear and answer such petition, on a day to be fixed in such notice, not more than 10 days nor less than five days after the service of such notice. Such notice, with a copy of the petition attached, shall be served by the sheriff upon the defendant, and any other person named therein, in the same manner as petitions and process are served in other civil cases. On or

before the day fixed in such notice, unless for good cause shown the presiding judge shall extend the time therefor, the defendant shall appear and answer such petition and may set up by way of answer or cross-action any right or interest he may have or claim in such proceeding. Any other person who was a candidate at such primary or election for the nomination or office involved and upon whom notice was served as aforesaid shall be deemed a litigant to such proceeding and may set up by way of answer or cross-action any right of interest he may have or claim therein.

(f) After filing, any petition, cross-action, or answer may be amended with leave of the court so as to include the specification of additional grounds of contest, other relevant facts, or prayer for further relief. After each amendment, a reasonable time to respond shall be given by the court to any opposing litigant. (Acts 1964, Extra. Sess., pp. 26, 179; 1969, pp. 329, 348.)

* * * * * * * *

34-1706. Hearing; powers of court.—(a) The presiding judge shall fix a place and time, within 20 days after the return day fixed in such notice to the defendant, for the hearing of the contest proceeding. Such judge may fix additional hearings at such other times and places as are necessary to promptly decide the contest.

(b) The court, presided over by such judge, shall have plenary power, throughout the area in which the contested primary or election was conducted, to make, issue and enforce all necessary orders, rules, processes and decrees, for a full and proper understanding and final determination and enforcement of the decision of every such case, according to the course of practice in other civil cases under the laws of this State, or which may be necessary and proper to carry out the provisions of this Code. The court shall have authority to subpoena and to

compel the attendance of any officer of the primary or election complained of, and of any person capable of testifying concerning the same, and also to compel the production of evidence which may be required at such hearing, in like manner, and to the same extent as in other civil cases litigated before such court; to take testimony and to proceed without delay, postponing for the purpose, if necessary, all other business, to the hearing and determination of such contest.

(c) The court may, in its discretion, limit the time to be consumed in taking testimony, dividing such time equitably among all litigants concerned, with a view therein to the circumstances of the matter and the proximity of the next succeeding primary or election. (Acts 1964, Extra Sess., pp. 26, 181.)

34-1707. Jury trial.—(a) All issues of a contest shall be fully tried and determined by the court, without the aid and intervention of a jury, unless a litigant to the contest shall demand a trial by jury at any time prior to the call of the case, and the court shall determine that it is an issue which under other laws of this State the litigant is entitled to have tried by a jury. Upon such determination, a jury shall be impaneled and the cause shall proceed according to the practice and procedure of the court in jury cases.

(b) In a case contesting the result of a primary or election held in two or more counties, each issue to be tried by a jury shall be tried by a jury impaneled in the county where such issue or a part thereof arose. Such jury shall be impaneled by the superior court of the county in which the jury trial is to be conducted and such trial shall be presided over by the judge as described in section 34-1704 and such trial shall proceed, insofar as practicable, as though it were being conducted in the

county of the superior court having jurisdiction of the contest.

(c) In a case contesting the result of a primary or election held within a single county, the court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In a case contesting the result of a primary or election held in two or more counties, the court shall require each jury impaneled to return only a special verdict in the form of a special written finding upon each issue of fact. In a case where a special verdict is to be rendered, the court shall submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict. (Acts 1964, Extra. Sess., pp. 26, 182.)

34-1708. Judgment; nomination, election or eligibility declared invalid; second primary or election.—(a) After hearing the allegations and evidence in the contest, the court shall declare as nominated, elected, or as eligible to compete in a runoff primary or election, that qualified candidate who received the requisite number of votes, and

pronounce judgment accordingly, and the clerk shall certify such determination to the proper authority. In the case of a contest involving a question submitted to electors at an election, the court shall pronounce judgment as to whether the same was approved or disapproved, and the clerk shall certify such determination to the defendant.

(b) When a defendant, who has received the requisite number of votes for nomination, election or to compete in a runoff primary or election, is determined to be ineligible for the nomination or office sought, the court shall pronounce judgment declaring the primary or election invalid as regards such nomination or office, and shall thereupon call a second primary or election to fill such nomination or office.

(c) If misconduct is complained of on the part of the poll officers of any election district, it shall not be held sufficient to set aside the contested result unless the rejection of the vote of such district would change such result.

(d) Whenever the court trying a contest shall determine that the primary or election is so defective as to the nomination, office or eligibility in contest as to place in doubt the result of the entire primary or election for such nomination, office or eligibility, then such court shall declare the primary or election to be invalid as regards such nomination, office or eligibility, and shall thereupon call a second primary or election to fill such nomination or office. (Acts 1964, Extra. Sess., pp. 26, 183.)

* * * * * * * *

34-806. Conduct of special elections.—Every special election shall be held and conducted in all respects in accordance with the provisions of this Code relating to general elections, and the provisions of this Code relating to gen-

eral elections shall apply thereto insofar as practicable, and not inconsistent with any other provisions of this Code. All such special elections held at the time of a general election shall be conducted by the poll officers by the use of the same equipment and facilities, so far as practicable, as are used for such general election. At least 29 days shall intervene between the call of a special election and the holding of same. (Acts 1964, Extra. Sess., pp. 26, 80; 1969, pp. 329, 335.)

* * * * * * * *

34-1218. Installation, custody and repair of vote recorders.—(a) When the use of vote recorders has been authorized in the manner herein prescribed, such vote recorders shall be installed, either simultaneously or gradually, within the county. Upon the installation of vote recorders in any election district, the use of paper ballots therein shall be discontinued, except as otherwise provided by this Code.

(b) In each election district in which vote recorders are used, the governing authority shall provide at least one vote recorder for each 200 electors, or fraction thereof, therein.

(c) Vote recorders of different kinds may be used for different districts in the same county.

(d) The governing authority shall provide vote recorders in good working order and of sufficient capacity to accommodate the names of a reasonable number of candidates for all party offices and nominations and public offices which, under the provisions of existing laws and party rules, are likely to be voted for at any future primary or election.

(Acts 1964, Extra. Sess., pp. 26, 118; 1968, p. 861; 1969, pp. 329, 343.)

* * * * * * * *

APPENDIX H

Georgia Laws 1967 Session

COUNTY BOARDS OF ELECTIONS IN CERTAIN COUNTIES (500,000 OR MORE)

No. 529 (House Bill No. 511)

An Act to provide for a board of elections in each county of this State having a population of more than 500,000 according to the 1960 United States decennial census and any future such census; to define its powers and duties concerning primaries and elections; to provide a method for appointment, resignation and removal of its members; to provide for the qualifications and term of its members; to provide for an elections supervisor, clerical assistants and other employees; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Created

Section 1. There is hereby created in each county of this State having a population of more than 500,000 according to the 1960 United States decennial census and any future such census, a county board of elections which shall have jurisdiction over the conduct of primaries and elections in such counties, in accordance with the provisions of this Act.

Section 2. The board of such county shall be composed of five members, each of whom shall be an elector and resident of the county, and who shall be appointed in the following manner:

Members

(a) Two members shall be appointed by the governing authority of such county from nominations made by the chairman of the county executive committee of the political party whose candidates at the last preceding regular general election, held for the election of all members of the General Assembly, received the largest number of votes in this State for members of the General Assembly, and

(b) Two members shall be appointed by the governing authority of such county from nominations made by the chairman of the county executive committee of the political party whose candidates at such election received the next largest number of such votes, and

(c) One member shall be appointed by the governing authority of such county, which member shall be designated permanent chairman of the board.

Members

Section 3. No person who holds elective public office shall be eligible to serve as a member of any such board of elections during the term of such elective office, and the position of any member of the board shall be deemed vacant upon such member qualifying as a candidate for elective public office.

Appointments

Section 4. The appointment of each member shall be made by the respective appointing authority, no later than thirty days preceding the date at which such member is to take office, by notifying the clerk of the superior court in writing of the name and address of the person appointed. The clerk of the superior court shall make a record of such notification on the minutes of the court, certify such appointments to the Secretary of State and provide for the issuance of appropriate commissions,

within the same time and in the same manner as provided by law for registrars. In the event any appointing authority fails (1) to make a regular appointment within the time specified in this section, or (2) to make an interim appointment to fill a vacancy within ninety days after the creation of such vacancy, such regular or interim appointment shall be made forthwith by the governing authority.

Terms

Section 5. Each member of the board shall serve for a term of two years and until his successor is appointed and qualified, except in the event of resignation or removal as hereinafter provided. Each member shall be eligible to succeed himself and shall have the right to resign at any time by giving written notice of his resignation to the respective appointing authority. Each member shall be subject to removal from the board at any time, for cause after notice and hearing, in the same manner and by the same authority as provided for removal of registrars. The first appointees under this Act shall take office on July 1, 1967.

Vacancies

Section 6. In the event a vacancy occurs in the office of any member before the expiration of his term, by removal, death or designation, or otherwise, the respective appointing authority shall appoint a successor to serve the remainder of the unexpired term. The clerk of the superior court shall be notified of interim appointments and record and certify such appointments in the same manner as for regular appointments.

Oaths

Section 7. Before entering upon his duties, each member of the board shall take substantially the same oath as required by law for registrars and shall have the same privileges from arrest.

Duties

Section 8. The board shall be responsible for the selection, appointment and training of poll workers and such workers shall be appointed, insofar as practicable, from lists provided the board by the county executive committee of each political party.

Same

Section 9. Each board of elections shall:

(a) With regard to the preparation for conduct and administration of elections, succeed to and exercise all duties and powers granted to and incumbent upon the ordinary by Title 34 of the Georgia Code of 1933, as now or hereafter amended, particularly by an Act entitled "The Georgia Election Code", approved June 24, 1964 (Ga. L. Ex. Sess. 1964, p. 26), of whatever nature and kind, and any other provision of law with respect thereto.

(b) With regard to the preparation for and conduct of primaries:

(1) succeed to all the duties and powers granted to and incumbent upon the ordinary by Title 34 of the Georgia Code of 1933, as now or hereafter amended, particularly by an Act entitled "The Georgia Election Code", approved June 24, 1964 (Ga. L. Ex. Sess. 1964, p. 26), of whatever nature and kind, and any other provision of law with respect thereto, and

(2) formulate, adopt and promulgate rules and regulations, consistent with law and the rules and regulations of the State executive committee of each political party, governing the conduct of primaries, to the end that, insofar as practicable, all primaries shall be uniformly conducted by the county executive committee of each political party, poll workers properly trained and voters adequately informed and instructed.

Nothing in this Act shall be construed to require joint primaries or to require the governing authority or any other public agency to bear any expense of conducting primaries not otherwise required by law.

Ordinary

Section 10. Upon the event of the initial appointment of five persons to the board and certification of such appointments by the clerk of the superior court, the ordinary shall be relieved from all powers and duties to which the board of elections succeeds by the provisions of this Act and shall deliver to the board of elections, upon request of the chairman, the custody of all equipment, supplies, materials, books, papers, records and facilities of every kind pertaining to such powers and duties.

Elections Supervisor

Section 11. There shall be a chief administrative officer of the board who shall be appointed by the governing authority of the county upon the recommendation of the board of elections and shall be designated "elections supervisor", and he shall have such duties and functions as may be prescribed by the board.

Compensation

Section 12. Compensation for each member of the board of elections, supervisor, clerical assistants and other employees of the board shall be such as may be fixed by the governing authority and shall be paid wholly from county funds.

Offices, etc.

Section 13. The governing authority of the county shall provide the board with such proper and suitable offices and with such clerical assistants and other employees as the governing authority shall deem appropriate.

Definitions

Section 14. The words "election", "elector", "political party", "public office", "special election" and "special primary" shall have the same meaning ascribed to those words by Code Section 34-103 of the Code of Georgia of 1933, as amended, unless otherwise clearly apparent from the text of this Act.

Effective Date

Section 15. This Act shall become effective July 1, 1967.

Section 16. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved April 18, 1967.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-162

HENRY D. DODSON and G. EVERETT MILLICAN,
Petitioners,

vs.

WILLIAM GRAHAM, JR., etc., et al., and METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia, in this case, which is unreported, is appended hereto. The unreported opinion of the United States Court of Appeals for the Fifth Circuit is found in Petitioners' Appendix A.

QUESTIONS PRESENTED

Whether the Fifth Circuit Court of Appeals correctly affirmed the District Court holding that federal jurisdiction was lacking and the litigation should be dismissed because:

1. Section 5 of the Voting Rights Act of 1965 [42 U.S.C.A. § 1973(c) (1970)] does not confer federal jurisdiction upon private litigants when the Attorney General of the United States approves a state law which is applicable to only one county and which transfers from the Ordinary of such county to a County Board of Elections the power and duty to conduct elections.

2. Section 11 of the Voting Rights Act of 1965 [42 U.S.C.A. §1973(i)(b) (1970)] does not confer federal jurisdiction to void an election on the grounds of intimidation of voters when the intimidation consisted solely of distribution of campaign literature and the persons bringing the suit have not been intimidated.

3. The State Court recount of the votes mooted petitioners' claim of an inadequate state law remedy.

STATEMENT OF THE CASE

Petitioners' statement of the case is neither complete nor entirely accurate. The facts of this case are found in the opinions of the Fifth Circuit and the District Court for the Northern District of Georgia which are appended to the Briefs.

The litigation arises out of the November 9, 1971, submission to the voters of Fulton County, Georgia, of the question of whether they favored the approval of a "Rapid Transit Contract and Assistance Agreement," pursuant to the provisions of Ga. L. 1965, p. 2243, Ga. L. 1966, p. 3264, and Ga. L. 1971, pp. 2082, 2092. The election was conducted by paper ballots pursuant to GA. CODE ANN. §34-806 (1970). As finally certified there were 53,760 votes in favor of the Contract and Assistance Agreement and 53,299 against it.

Within a few days of the official consolidation and certification of the returns of the election, suits quite similar to Petitioners' action were filed in the Superior Courts of Fulton and DeKalb Counties, Georgia. **Henderson v. County Board of Registration and Elections**, Superior Court of Fulton County, Civil Action No. B-69960; **Ollila v. Graham**, Superior Court of DeKalb County, Civil Action No. 64,015. Both the **Ollila** and **Henderson** suits sought a recount and the more drastic relief of having the election declared void. A full recount was ordered and held in the **Henderson** case. The recount showed that the number of votes cast for approval of the Contract and Assistance Agreement actually increased. A judgment was entered that the Contract and Assistance Agreement was approved.

A full hearing was held in the **Ollila** case and a final order was entered granting motions to dismiss. The Court

held that there was no jurisdiction in DeKalb County over the Fulton County Board of Registration and Elections and that the Board, not its employee Mr. Graham, was the proper defendant in a contest of the November 9 election.

Both cases were appealed to the Court of Appeals of Georgia, where the lower court judgments were affirmed. **Henderson v. County Board of Registration and Elections,** ... Ga. App. ..., ... S.E.2d ... (1972); **Ollila v. Graham,** ... Ga. App. ..., ... S.E.2d ... (1972). The Georgia Court of Appeals held in the two cases that: (1) It was not error for the trial judge to conduct the recount of the ballots without the intervention of a jury; (2) the trial judge properly disregarded alleged irregularities in two precincts where the rejection of the vote in those precincts would not change the results of the election; (3) there was no showing of a sufficient quantity of spoiled ballots, not accounted for, to place the result in doubt; (4) the Fulton County Board of Registration and Elections was the proper defendant in the election contest rather than any individual, and jurisdiction resided in the Superior Court of Fulton County. A subsequent petition by Henderson for certiorari to the Supreme Court of Georgia was denied. **Henderson v. County Board of Registration and Elections,** ... Ga. ..., ... S.E. 2d ... (1972).

Petitioners' complaint was brought in the instant case as a class action on behalf of all Fulton County residents who had voted against approval of the Contract and Assistance Agreement and was filed with the United States District Court for the Northern District of Georgia. The alleged bases for jurisdiction were the Equal Protection and Due Process Clauses of the Fourteenth Amendment, §5 of the Voting Rights Act of 1965 [42 U.S.C.A. §1973(c) (1970)], and §11 of the Voting Rights Act of 1965 [42 U.S.C.A. §1973(i)(b) (1970)].

The complaint alleged that votes in said election had not been counted correctly and that Defendant Graham was the public official who formerly declared the result of the election within the contemplation of GA. CODE ANN. §34-1701(b) (1970). Petitioners also alleged that election officials allowed Metropolitan Atlanta Rapid Transit Authority ("MARTA") supporters to distribute literature within 250 feet of polling places. They further alleged that although the Election Code of Georgia might be valid and constitutional, its application to the Fulton County election was unconstitutional since the contest provisions of the Code did not provide for contest in the factual situation presented by the Petitioners. Petitioners prayed that a recount of all ballots be conducted by the Court or in the alternative the election be declared void and illegal.

Petitioners later amended their complaint and alleged that 1967 Georgia Acts p. 3211 transferred the election duties of the Ordinary of Fulton County to the Fulton County Board of Elections and that this change had not been approved pursuant to the requirements of §5 of the Voting Rights Act of 1965. The amendment also alleged paper ballots were illegally used instead of voting machines. The amendment asked that a three judge court be convened pursuant to §5 of the Voting Rights Act.

The District Court received evidence, stipulations of fact, and heard argument by counsel for all parties. Petitioners filed an amendment in open court alleging that the State of Georgia had not filed a declaratory judgment nor sought the opinion of the Attorney General of the United States as required by §5 of the Voting Rights Act of 1965.

At the District Court hearing, counsel for Petitioners stipulated that neither of the Petitioners had been intimidated and that the intimidation alleged in the complaint

was based solely on the alleged presence of MARTA supporters at polling areas with pro-MARTA literature. Moreover, counsel for petitioners stipulated that the 1967 Georgia Act did not have any affect on the right to vote because of race or color.

The District Court held that correspondence which was received into evidence from the United States Attorney General's office clearly showed § 5 of the Voting Rights Act had been satisfied. The letters are quoted in full by the Fifth Circuit opinion. Brief for Petitioners, A-6, -7, -8, -9. The Court also held that the alleged passing out of campaign literature in polling areas would not constitute intimidation within 42 U.S.C.A. § 1973(i)(b) (1970). Finally, it held that the **Henderson** recount belied Petitioners' contention that state law did not afford an adequate remedy for contesting Fulton County elections and that regardless, such a complaint did not present a proper federal question.

The District Court dismissed the action for lack of federal jurisdiction. Petitioners appealed and the District Court opinion was affirmed by the Fifth Circuit Court of Appeals. The Court of Appeals agreed with the District Court that the record was void of anything that could possibly be construed to constitute intimidation, threats or coercion (or attempts at such) within the meaning of § 11(b) of the Voting Rights Act of 1965. The Court stated that the resolution of the non-federal issues by the Court of Appeals of Georgia in the **Henderson** and **Ollila** cases left for its determination only the question of whether the special election of November 9, 1971, was conducted in violation of § 5 of the Voting Rights Act of 1965. The Court quoted the correspondence involving the Fulton County Attorney, the Attorney General of Georgia, and the United States Attorney General. Noting that

the United States Attorney General specifically stated that he had no objection to enforcement of the Georgia laws in question, the Court held that there had been compliance with § 5 of the Voting Rights Act as well as with the regulations promulgated thereunder.

Contrary to Petitioners contentions, the ruling by the Court of Appeals was correct and properly disposed of all matters before it.

ARGUMENT

I

The Application for Writ of Certiorari Should Be Denied

Petitioners' attempt to prolong the litigation by seeking yet another review of the questions of federal jurisdiction is not a proper case for the granting of certiorari. See **Magnum Co. v. Coty**, 262 U.S. 159 (1923). No amount of strained semantics can convert the Court of Appeals holding that federal jurisdiction is lacking, into a decision warranting review by this Court on certiorari. The Court of Appeals decision affirming the District Court opinion was manifestly correct, and contrary to Petitioners' contentions, was in direct accord with the two recent decisions of this Court interpreting § 5 of the Voting Rights Act of 1965. See **Perkins v. Matthews**, 400 U.S. 379, 27 L.Ed.2d 476, 91 S.Ct. 431 (1971); **Allen v. Board of Elections**, 393 U.S. 544, 22 L.Ed.2d 1, 89 S.Ct. 817 (1969). There is no important question of federal law presented by the Petition and accordingly, this Court should exercise its judicial discretion and deny certiorari.

A

The Decision Below Is Clearly Correct

(1) The Fifth Circuit correctly held that § 5 of the Voting Rights Act of 1965 had been complied with and federal jurisdiction was lacking.

At the trial level Petitioners based their main contention of federal jurisdiction on an alleged failure to comply with § 5 of the Voting Rights Act of 1965, 42 U.S.C.A. § 1973(c) (1970).

Prior to 1967, Georgia law uniformly provided that the Ordinary of each county had the powers and duties of supervising elections held in this county. Ga. Laws 1964, pp. 26, 40. In 1967 the Georgia General Assembly transferred this responsibility to a county board of elections in all counties having a population of 500,000 or greater. Ga. Laws 1967, p. 3211. Pursuant to this Act, the Fulton County Board of Elections was created and it administered the November 9 election in Fulton County. Petitioners contended in the District Court that the 1967 statute was subject to § 5 of the Voting Rights Act and that it had not received judicial or administrative approval prior to enforcement. Upon being faced with evidence showing that approval had been obtained [Brief for Petitioners, A-6, -7, -8, -9], Petitioners contended that the approval was not adequate as it was obtained by Fulton County rather than the State of Georgia, and that regardless of approval, § 5 was still available to confer jurisdiction.

It is clear that appropriate approval was obtained. The regulations for complying with § 5 state, in relevant part:

> "Section 5 requires that, prior to enforcement of any change affecting voting, the State or **political subdivision which** has enacted or **seeks to administer the change affecting voting** must obtain either a judicial or an executive determination that denial or abridgment of the right to vote on account of race or color is not the purpose and will not be the effect of the change.
>
> . . .
>
> **Changes affecting voting shall be submitted by the** chief legal officer or other **appropriate official of the** State or **political subdivision in which the change is proposed to be effective.** When one or more counties within a State will be affected, the State may submit

a change affecting voting on behalf of the covered county or counties." 36 Fed. Reg. 18187 (1971) (Emphasis supplied).

Fulton County is the only Georgia county or political subdivision charged with the responsibility of administering the change ordered by the 1967 Act and it is the only political subdivision or county affected by the Act. The unrelenting efforts of the Fulton County Attorney in coordination with the Attorney General of Georgia to seek approval from the United States Attorney General of the change made by the 1967 Act is well documented. Brief for Petitioners, A-6, -7, -8, -9. Thus, the Fifth Circuit correctly concluded:

> "The Attorney General of the United States, on October 30, 1968, discharged his responsibility under § 5 by notifying the County Attorney that the 1967 Georgia Law had been approved.
> This amounted to compliance with the federal statute and with the regulations promulgated thereunder." Brief for Petitioners, A-11.

It is clear that once § 5 approval has been obtained, a private litigant cannot rely upon § 5 for jurisdiction. This Court called for dismissal in suits such as the instant case where approval has been obtained when it stated:

> "Once the State has successfully complied with the § 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by § 5." **Allen v. Board of Elections**, 393 U.S. 544, 549-50, 22 L.Ed. at 8.

Pursuant to this mandate, the Fifth Circuit and District Court correctly held that § 5 did not give jurisdiction to Petitioners.

(2) **The Fifth Circuit correctly held that jurisdiction is not given to the case by § 11 of the Voting Rights Act of 1965.**

Petitioners conceded at the trial that their claims of intimidation rested solely on the charges of alleged distribution of campaign literature by MARTA supporters at polling places. Taking the allegations at their broadest, the District Court concluded and the Court of Appeals agreed that they fell far short of the acts prescribed by § 11 of the Voting Rights Act of 1965. Acts giving jurisdiction pursuant to § 11 involve the use or threat of physical force or violence, or at least the use of severe economic pressure. See, **e.g., United States v. McLeod,** 385 F.2d 734 (5th Cir. 1967); **United States v. Crenshaw County,** 290 F.Supp. 181 (M.D.Ala. 1968). Accordingly, the passing out of literature is far below the mark set by § 11.

With neither race nor any form of intimidation being present in the record, the District Court concluded and the Court of Appeals agreed that § 11 of the Voting Rights Act does not furnish jurisdiction to the Petitioners.

(3) **The State Court recount of the votes mooted petitioners' claim of an inadequate state law remedy.**

Petitioners' contention that GA. CODE ANN. § 34-1704 (1970) did not provide them with a remedy to contest the Fulton election is based solely on unwarranted assumptions and an untenable reading of the Georgia law. This is shown by the two contests of the Fulton County election in the state courts. In **Henderson,** *supra,* suit was brought in Fulton County against the County Board, which employs Mr. Graham, one of the Defendants in the instant litigation. In **Ollila,** *supra,* suit was brought in DeKalb County against Mr. Graham as an employee of the County Board. In other words, the **Ollila** suit was brought pursu-

ant to the reading of GA. CODE ANN. § 34-1704 (1970), which is urged by Petitioners in the instant litigation. The result was a dismissal by the DeKalb Court on the ground that suit should have been brought in Fulton County against the County Board of Registration and Elections and the granting of a recount by the Fulton Court. As the District Court noted, Georgia's courts are liberal in construing the Georgia Election Code. The **Henderson** decision proves that the remedy to contest an election is available when the rules are followed. Petitioners had the contest remedy available had they chosen to enter state court pursuant to the rules set forth by Georgia law. Their failure to so act did not give rise to federal jurisdiction.

For all of the foregoing reasons, the Fifth Circuit and the District Court correctly held that the action should be dismissed.

B

There Is No Conflict of Decision

Petitioners' contentions that the Court of Appeals opinion is in conflict with the **Allen** case are spurious and deserve little response. Petitioners incorrectly construe the **Allen** case as holding that §5 of the Voting Rights Act is available to confer federal jurisdiction on private litigants regardless of the fact that approval under §5 has been obtained. As this Court specifically stated:

> "Once the State has successfully complied with the §5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by §5." **Allen v. Board of Elections**, 393 U.S. 544, 549-50, 22 L.Ed. 2d at 8.

Both the District Court and the Fifth Circuit relied on this exact language in making their decisions. The asserted conflict does not exist.

C

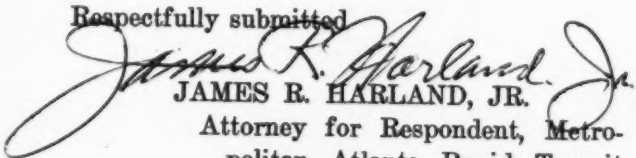
There Is No Important Question of Federal Law

This action gravitates around an election which has been thoroughly examined and well litigated in the lower and appellate courts of Georgia. Petitioners' claim of a federal question under §5 of the Voting Rights Act of 1965 is torpedoed by the actual facts and specific language of this Court in **Allen**, *supra*. The record is undisputed that the United States Attorney General specifically concurred in the enforcement of the amendment to state law. This Court has unequivocally stated that such approval removes §5 as an available avenue of jurisdiction to the private litigant. This has happened, nothing more is involved and the Petition for a Writ of Certiorari is entirely inappropriate.

CONCLUSION

For the reasons stated above, Respondent says that a Petition for a Writ of Ceritorari should be denied.

Respectfully submitted,



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Certificate of Service

I, James R. Harland, Jr., a member of the Bar of the Supreme Court of the United States, do hereby certify that a true and correct copy of the foregoing Brief in Opposition has been served upon counsel of record for Petitioners in this case, by placing same in the United States mail, postage prepaid, addressed to Mr. Moreton Rolleston, Jr., 2604 First National Bank Building, Atlanta, Georgia 30303.

This 29 day of August, 1972.

.....

James R. Harland, Jr.

APPENDIX

APPENDIX A

United States District Court, Northern District of Georgia, Atlanta Division

Henry D. Dodson and G. Everett Millican, Plaintiffs, vs. William Graham, Jr., as Supervisor of Elections of Fulton County, and J. W. Simmons, Clerk of the Fulton Superior Court, Defendants.	Civil Action Number 15868.

This is a suit for declaratory and injunctive relief brought by plaintiffs in the wake of the initially successful[1] referendum on November 9, 1971, for the approval of the so-called MARTA plan for rapid-transit in the metropolitan Atlanta area. Concurrently, two state suits have been filed attacking the validity of the election on the ground of various violations and seeking a recount under applicable state law. Ga. Code §34-1701 ff. Following the hearing here, a recount was ordered in Fulton Superior Court.

Originally filed as a class action, the complaint set out (1) numerous allegations of improper count, invalid ballots, and a "garden variety" of voting irregularities. In addition, plaintiffs sought to invoke federal jurisdiction on the grounds (2) that some voters were "intimidated" by the proponents of MARTA in violation of the Civil

[1] Out of some 107,000 votes in Fulton County, the announced tabulation showed a margin of only 461. The judicial recount showed a margin of 471.

Rights Act of 1964[2] and (3) that the state remedies were complicated, unworkable, and therefore in violation of the constitutional right of "due process." While the complaint also invokes the right of "equal protection", there are no allegations or evidence of discrimination by virtue of race, color, or other condition nor by virtue of the "one-man one-vote" principles implicit in such a claim. By amendment at trial, the plaintiffs switched tactics and sought a federal order voiding the entire election on the grounds (4) that the election was conducted under a voting law changed in violation of § 5 of the Civil Rights Act of 1965 (42 U.S.C. §1973c).

To the complaint, the named defendants, who are the present and former voting supervisors for Fulton County, filed answers and moved to dismiss on jurisdictional grounds. Meanwhile, MARTA, the Metropolitan Atlanta Rapid Transit Authority, was allowed to intervene and joins in the motions to dismiss. The motions to dismiss appear to be meritorious and will be granted as to all claims of federal jurisdiction.

(1) In candor, plaintiffs' counsel concedes that the voting irregularity questions are basically for the state, rather than federal, forums. In the absence of well-established equal protection questions, it is apparent that there is no federal jurisdiction over a contested state election. Traditionally, of course, court interference with elections is a creature of statute as there was no common-law judicial right in such matters. 29 CJS, *Elections*, § 245 ff. Similarly, absent a special statute or the specific equal

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[2] Apparently, reference was intended to § 11 of the 1965 Civil Rights Act [42 U.S.C. § 1973i(b)] which provides: "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, * * *"

protection matters referred to, there is no federal right to vote in state elections. Consequently, federal interference in state election contests cannot *ipso facto* be warranted. **Johnson v. Hood**, 430 F.2d 610 (5th Cir. 1970). See also **Bynum v. Burns**, 379 F.2d 229 (8th Cir. 1967); **Johnson, et al. v. Stevenson**, 170 F.2d 108 (5th Cir. 1948); **Marshal v. Maginnis**, 229 F.2d 347 (5th Cir. 1956); **Peterson v. Sears**, 238 F. Supp. 12 (N.D. Iowa 1964).

(2) Looking at the claims of intimidation liberally, the most they legally can support is a violation of §11(b) of the Voting Rights Act. 42 U.S.C. § 1973i(b). Originally, the Act appeared to provide only for suits by the Attorney-General for enforcement of the rights conferred therein, mainly based on racial discrimination, not claimed here. *E.g.*, **United States v. LeFlore County**, 371 F.2d 368 (5th Cir. 1967); **United States v. Executive Com. of Dem. P. of Dallas Co., Ala.**, 254 F. Supp. 537 (S.D. Ala. 1966). However, there is legislative history to the effect that §11(b) is not limited to racial claims. U. S. Code Cong. and Adm. News, p. 2462. Also, there is an inference that private parties may bring federal suits for various violations of the Act in state election matters. See **Allen v. State Board of Elections**, 393 U. S. 544 at 555 fn. 18 (1968). However, here there is no claim that the named defendants "intimidated" anyone, but only that unnamed private supporters of MARTA did so. In such setting, it is doubtful that federal jurisdiction would lie. See **United States v. Harvey**, 250 F. Supp. 219 (E.D. La. 1966).

Assuming arguendo that individual plaintiffs could collaterally attack the acts of private parties in a suit against the voting supervisor, the suit still must fail. At trial, it was conceded that the named plaintiffs were not intimidated by anyone nor could any person be named who was, in fact, intimidated in casting his vote. The claim is only stated as a conviction that some unknown party was

in some way intimidated, although no evidence was presented to such effect. Plaintiffs contend that they may bring a class action in behalf of such unknown persons. The court knows of no authority to draw such a conclusion. To the contrary, " 'Without a class on the one hand or a proper representative on the other, a class action pursuant to Rule 23(a) must fail. It is elementary that "an individual suing in behalf of the members of the class must be a member of the class he is supposed to represent." 2 Barron & Holtzoff, Federal Practice and Procedure § 567 at 308. See 3 Moore, Federal Practice 23.04.' **Hamer v. Campbell**, 358 F.2d 215(1) (5th Cir. 1966). While great latitude has been allowed in class actions involving civil rights, it is fundamental that some plaintiff must show injury and the proposed class can rise no higher than the individual plaintiffs themselves. Thus, the plaintiffs cannot represent a class of whom they are not a part. (citing cases.)" **Wilson v. Kelley**, 294 F. Supp. 1005 (7, 8) (N.D. Ga. 1968), aff'd 393 U. S. 266. Thus, the action by the named plaintiffs must fail on this ground.

Moreover, plaintiffs admit that the claimed intimidation rests solely on the charges of distribution of campaign literature and the presence of MARTA supporters at the polling places. In this regard, taking the allegations at their broadest, the court concludes that they fall far short of the acts proscribed by § 1973i(b). If the Act prevents anyone from endeavoring to influence a vote and confers federal jurisdiction to inquire into any election in which that is done, then the District Courts' task in this regard would never be completed. It is concluded that the complaint on this basis must be dismissed for failure to state a claim upon which relief can be granted. FRCP 12. At most, the allegations show a possible violation of state election laws, which prohibit such activities within certain physical limits of the polls. See Ga. Code § 34A-1206.

Even so, it does not become a federal question, but is only another irregularity to be considered by the state in policing its own elections under the authorities cited in (1) above.

(3) Thirdly, the plaintiffs contend that their state remedies are so defective as to constitute a denial of due process. This argument is the most intriguing of all those advanced for if there is no remedy or if the statutory remedy is so meaningless as to amount to no remedy, surely some forum ought to be found to insure honest elections and accurate tallies of votes. Otherwise, the democratic processes could well be thwarted. However, it does not follow that the federal courts are needed to vindicate any such rights. Here, plaintiffs argue that the present election code could result in jurors from Fulton County being impaneled in DeKalb County because of the defendant Graham's residence therein. Ga. Code § 34-1707. Admittedly, parts of the contest provisions are cumbersome. However, the grounds for an attack on an election in Georgia are wisely broad. Ga. Code § 34-1703. More importantly, the Georgia courts have consistently demonstrated a zealous protection of voters' rights and have fashioned remedies to deal with a variety of problems without technical limitations on jurisdiction. All that is required is a reasonable showing that the result might be changed. *E.g.* **Thompson v. Talmadge**, 201 Ga. 807 (1947); **Crow v. Bryan**, 215 Ga. 661 (1960); **Laite v. Stewart**, 112 Ga. App. 853 (1965); **Lowe v. Weltner**, 118 Ga. App. 635 (1968). The Superior Courts of Georgia rightly possess great powers and as the courts closest to the people are free to deal with all of their problems in an effective manner. Any fear that they cannot do so is belied by the recount and protest hearings ordered in this instance by the Fulton Superior Court. The conclusion that the plaintiffs will be denied due process by the State is unfounded and unwarranted.

This finding is in keeping with comity considerations and specific federal authorities to the effect that such questions do not rise to the level of federal due process. **Snowden v. Hughes**, 321 U. S. 1 (1943); **Johnson v. Hood**, 430 F.2d 610 at (1, 2) (5th Cir. 1970); **Bacon v. Holzman**, 264 F. Supp. 120 (N.D. Ill. 1967). Eventually this doctrine may be eroded and at the command of Congress the District Courts may have the growing role of omsbudsman extended to that of supervising all elections on a continuing basis. In some instances, the inquiry into state elections has already been extended beyond the previously clear limits. However, in this connection, the court is constrained to the view of Judge Cameron: "The case before us involves nothing but a local political brawl. To extend federal jurisdiction to such would spread so thin the energies of the handful of men constituting the Federal Judiciary that there would be no time left for the performance of their legitimate duties. It would, moreover, lend substance to the widespread feeling that 'The Cult of the Cloth' is engaged, by some sort of bootstrap-lifting technique, in an effort to turn over to federal functionaries the most intimate prerogatives of local self-government in derogation of universally accepted tenets of State-Federal relationships. Such a concept, wherever it is given effect, cannot, in my opinion, fail to bring the whole federal judicial process into disrepute." **Tullier v. Giordano**, 265 F.2d 1 (5th Cir. 1959) (dissenting opinion at 5, 6).

(4) The Voting Rights Act of 1965 was enacted to ferret out the last vestiges of racial discrimination in voting. **Allen v. State Board of Elections**, 393 U. S. 544 (1968). To effectuate this purpose, § 4 of the Act (42 U.S.C. § 1973b) prohibits the use of literacy and related tests in those states in which less than 50% of the persons of voting age were registered on either November 1, 1964, or November 1, 1968, or in which less than 50% of those

persons actually voted in the presidential election of 1964 or 1968. In addition, § 5 of the Act (42 U.S.C. § 1973c) provides in relevant part that:

> "Whenever a State or political subdivision with respect to which the prohibitions set forth in [§ 4 above] —are in effect shall enact or seek to administer any voting qualifications or prerequisites to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on [November 1, 1964, or November 1, 1968]—such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice or procedure: *Provided,* That such qualification, prerequisite, standard, practice or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission,—. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to Supreme Court."

Plaintiffs contend that § 5 applies here and that it affords a basis for federal jurisdiction.

Prior to 1967, Georgia law uniformly provided that the Ordinary of each county was to supervise the counting of ballots in all state elections. In 1967 the General Assembly transferred this responsibility to an appointed "Supervisor of Elections" in all counties having a population of 500,000 or greater. As Fulton County was included in this category, the new Act applied to it. Plaintiffs contend that the 1967 statute imposes a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect" on November 1, 1964, and that therefore it may not be enforced without prior judicial or administrative approval. They contend further that approval was not properly obtained and that the MARTA referendum is accordingly void.

Relying on **Allen**, *supra*, plaintiffs argue (1) that they have standing to litigate the applicability of § 5 in spite of their status as private parties, and that, upon proof of the State's failure to secure approval, they are entitled to an order voiding the election; (2) that as private parties they are not required to maintain the present action in the District of Columbia; and (3) that they are entitled to a determination of their contentions by a three-judge court.

As far as it goes plaintiffs' reading of **Allen** would appear to be correct. However, it is undisputed on the present record that the State has in fact secured the Attorney General's approval of the 1967 statute. See Defendants' Exhibits 1, 2, 3, 4. By letter dated April 18, 1968, the Fulton County Attorney formally submitted the statute to the Attorney General and requested his advice on the matter. By letter of October 30, 1968, the Attorney General's office replied that it did not find the statute objectionable. Plaintiffs argue that submission by the County Attorney, rather than by the State Attorney General, is

insufficient inasmuch as a **state** statute was involved. Although the Court would not regard this distinction as significant in any event, it does appear from the County Attorney's letter that the submission was made at the specific request of the State Attorney General. For all practical purposes, then, the approval requirements have been satisfied. This being the case this Court's inquiry under § 5 is at an end. **Perkins v. Matthews,** 400 U. S. 379 (1971). As the Supreme Court made clear in **Allen:**

> "Once the State has successfully complied with the § 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by § 5." (p. 549-550.)

Although the Court need not reach this issue for purposes of its decision, it feels constrained to state that in its view § 5 was never intended to cover the kind of election law change involved here. Section 5 provides that until approval of the proposed change has been obtained "no person **shall be denied the right to vote** for failure to comply" with such change. It is difficult to conceive just how a transfer of supervisory responsibilities could operate to deny anyone the right to vote. Plaintiffs have made no allegation, much less any showing, that this change was racially motivated or that it is otherwise discriminatory. Absent such allegation and showing there is simply no basis on which to conclude that the change is comprehended by § 5.

The Court is aware that, under **Allen,** the latter question concerning the applicability of § 5 to the voting change must ordinarily be determined by a three-judge court. In recent years, however, the number of requests for three-judge courts has increased greatly, and, in the interests of judicial economy, the district courts have often been compelled to have an initial investigation by a single

judge to ascertain whether three-judge jurisdiction is actually present or not. Such is the case here. Having found that administrative approval has been obtained, the court is satisfied that there is no genuine controversy to submit to a three-judge panel under the **Allen** case. Accordingly, the prayer for a three-judge court is denied.

In the absence of necessary grounds of equal protection and for the reasons stated herein, the motions to dismiss for lack of federal jurisdiction are granted. Rule 12(h)(3).

It is so ordered.

This the 30th day of November, 1971.

/s/ SIDNEY O. SMITH, JR.
United States District Judge